No. 374. 126
Brief of Boone v. Russell

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In the Supreme Court of the United States

OCTOBER TERM, 1900.

No. 374.

BIENVILLE WATER SUPPLY COMPANY,
Appellant,

VS.

THE CITY OF MOBILE, et al., Appellees.

BRIEF OF THE APPELLEES ON THEIR MOTION TO DISMISS OR AFFIRM.

B. B. BOONE,
E. L. RUSSELL,
Counsel for Appellees.



In the Supreme Court of the United States

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No. 374.

BIENVILLE WATER SUPPLY COMPANY,
Appellant,

VS.

THE CITY OF MOBILE, et al., Appellees.

BRIEF OF THE APPELLEES ON THEIR MOTION TO DISMISS OR AFFIRM.

STATEMENT OF THE CASE.

The bill in equity in this case was filed in the Circuit Court of the United States, Fifth Judicial Circuit, Southern District of Alabama, on February 21st, 1899, and sought to enjoin the City of Mobile until July 1st, 1908, from erecting, constructing or operating a system of water works connected with or having its source of supply of water from Three Mile Creek or any other stream of water in Mobile County, Alabama, other than Three Mile Creek.

At the time the bill was filed the water works system of the City of Mobile was being actively constructed under express authority to that end from the General Assembly of Alabama. The bill also sought to enjoin the City of Mobile from operating what is known as the Stein system of water works which it had acquired. An injunction was prayed upon the ground that such action on the part of the City of Mobile would impair the exclusive right of the appellant of supplying water to the City of Mobile and its inhabitants, secured to it by the act of the General Assembly of Alabama incorporating appellant, approved February 19th, 1883, (Record, pages 66-71)

and which said act was amended by an act of the General Assembly of Alabama, approved February 14th, 1885, set out in the bill and also put in as part of the evidence in the cause, (Record, pages 2 and 72) in violation of Article 1, Section 10 of the Constitution of the United States. The appellees filed a sworn answer to the bill on February 27th, 1899, and in their answer, claimed that the Bienville Water Supply Company under its charter from the State of Alabama, did not have an exclusive privilege of supplying the City of Mobile and its inhabitants with water until July 1st, 1908, as alleged in its bill, because:

1st. Under the charter of the Bienville Water Supply Company (Acts of Alabama, 1884-5, pages 489-91) as set out in the first paragraph of the bill, reading: "*But "nothing in this act shall be construed to prohibit the or- "ganization hereafter of any company for the purpose of "supplying the City of Mobile or any other place with "water which does not interfere with the property rights "or rights of obtaining water pertaining to this com- "pany,*" (Record, pages 2 and 72), it is clear the General Assembly did not grant said Water Supply Company an exclusive privilege of supplying water to the City of Mobile, and its inhabitants.

2nd. That if said last named act conferred such exclusive privilege upon the appellant, it had been amended and such exclusive privilege taken away by the General Assembly of Alabama by an act amending said act of February 14th, 1885, approved February 23rd, 1899, Local Acts of Alabama, 1898-9, page 1689. (Record, page 21.)

3rd. That any alleged exclusive privilege so to supply water was repealed by an act of the General Assembly of Alabama, entitled "An act to authorize the City of Mobile to provide, maintain and operate systems of water works and sewerage," approved November 30th, 1898. Local Acts of Alabama 1898-9, page 19. (Record, page 43.)

Appellees claim that said repeal was effective under Article XIV, Section 1, of the Constitution of Alabama, which is as follows:

"Corporations may be formed under general laws, "but shall not be created by special act, except for muni-

"cipal, manufacturing, mining, immigration, industrial, "and educational purposes, or for constructing canals, "or improving navigable rivers and harbors of this State, "and in cases where, in the judgment of the General "Assembly, the objects of the corporation cannot be "attained under general laws. All general laws and "special acts passed pursuant to this section may be "altered, amended or repealed."

4th. Appellees claim that the Constitution of Alabama, of A. D., 1875, in Article I, Section 23, and in Article XIV, Section 2, forbade the General Assembly of Alabama from granting an exclusive privilege to supply water to the City of Mobile and its inhabitants.

These provisions of the Constitution of Alabama read as follows:

Article I, Section 23, "That no ex post facto law, or any law impairing the obligation of contracts, or making any irrevocable grants of special privileges or immunities, shall be passed by the General Assembly."

Article XIV, Section 2, "All existing charters or "grants of special or exclusive privileges, under which "a bona fide organization shall not have taken place "and business been commenced in good faith, at the "time of the ratification of this constitution, shall there-"after have no validity."

The last mentioned sections of the constitution are also set out in the decision of the Supreme Court of Alabama in the Birmingham Street Railway cases, quoted and found at page 3 of this brief.

The appellees insisted in their answer that when the General Assembly of Alabama passed the laws authorizing the City of Mobile to construct and operate water works, and the act of February 23rd, 1899, amending the charter of appellant and affecting the repeal of any alleged exclusive privileges theretofore possessed by it, whether the General Assembly acted under Article I, section 23, or under Article XIV, section 1, or under Article XIV, section 10 of the Constitution of Alabama, all questions of expediency, and respecting the just operation of said laws under the power vested in the General Assembly by the constitution, were settled when

said laws were enacted. That all questions respecting the repeal of the alleged exclusive privilege were necessarily questions "of legislative discretion, and, on questions such as this, not one of judicial determination."

The appellees showed in their answer that the City of Mobile was specially authorized by the General Assembly by the act approved December 10th, 1898, entitled "An act to authorize the City of Mobile for the purpose of aiding in the erection of its municipal water works, to condemn by eminent domain the outstanding interest in what is known as the Mobile City Water Works," to condemn by eminent domain all interest of every kind, character or description not owned by the City of Mobile in the Stein or Mobile City Water Works, for the purpose of aiding in the construction of the new system of water works of said city. (Record, page 27.)

The City of Mobile has a contract right, not subject to repeal or impairment, to secure water from Three Mile Creek for its water works, under a contract with one Albert Stein executed on December 26th, A.D. 1840, ratified and confirmed by an act of the General Assembly of Alabama, entitled "An act for the promotion of the health and convenience of the City of Mobile, by the introduction of a supply of wholesome water into said city, to be used for domestic purposes and the extinguishment of fires," approved January 7th, 1841. (Record, page 173.)

The testimony introduced in evidence showed without conflict that the City of Mobile intended to take water from Three Mile Creek for its new system of water works. (Record, pages 145, 160, 164.)

The evidence in the cause also showed that Eight Mile Creek was not the same creek as Clear Creek, the source of water supply of the appellant. (Record, pages 128, 131, 136, 144, 149.)

The cause was argued and submitted to the Circuit Court for decision upon the bill, answer and proof. The court rendered a decision on June 4th, 1900, dismissing the bill of appellant out of that court at its costs. (Record page 178.) All the acts of the General Assembly of Alabama to which reference is made, are set out in full in the record at the pages indicated herein.

ARGUMENT.

The complainant seeks to enjoin the City of Mobile from operating the Stein or Mobile City Water Works, and from constructing a system of water works to connect with Three Mile Creek or any other creek or stream in Mobile county. In the prayer of the bill and in other parts thereof, it is claimed that the appellant has an exclusive privilege of supplying the City of Mobile and its inhabitants with water. (Record, page 16.) Again, in paragraph ten (10) of the bill, (Record, page 9,) it is stated that its exclusive privilege is not a monopoly, although it is insisted that the City of Mobile has no right to erect or operate a system of water works, connected with any stream in Mobile county. We understand that an exclusive privilege is one which excludes others from exercising the same privilege. That whether a privilege is exclusive or not depends upon the fact of the exclusion of others from such right or privilege and not upon the length of time that others are debarred from exercising the right or privilege. The Supreme Court of Alabama, after quoting Article I, Section 23 and Article XIV, Section 2 of the Constitution of Alabama, through Mr. Justice Somerville in the case of the Birmingham and Pratt Mines Street Railway Company vs. Birmingham Street Railway Company, 79 Alabama, at page 473, said:

"These provisions occur for the first time in the Con-"stitution of 1875, and have not heretofore been the sub-"ject of construction by this court.

"What, it may be asked, is the nature of these special "or exclusive privileges, which are thus prohibited "to be granted by the legislature? It seems plain from "the terms used, that the evil intended to "be specially "prevented was the granting of exclusiveprivileges in the "nature of a monopoly by the legislative creation of corpo-"rate franchises. Monopolies were void at the common "law and not commonly confered by legislative grant, "and need no special inhibition in the organic law of a free "republic. They may now be regarded as relics of "governmental folly, rendered odious by royal preroga-"tive in the most extravagant periods of the European

"monarchies. In the strict sense, a monopoly is an ex-
"clusive right granted to one person, or a class of per-
"sons, of something which was before of common right.
"A franchise is a special privilege conferred by the State
"or government upon individuals, and which does not
"belong to citizens of the country by common right. It
"has been a common legislative practice to make grants
"of this kind, and they have led to much protracted liti-
"gation in all of the American courts. Examples of this
"kind are found in numerous cases where the exclusive
"privilege has been conferred on favored individuals
"and corporations, to manufacture and sell gas in a city;
"or to supply the inhabitants with water; or to construct
"a bridge, or run a ferry across a river between two
"given points, free from competition within certain
"limits; or to construct a canal, turnpike, or railroad be-
"tween certain designated termini; or to construct and
"rent a market house in a city; or to own and control
"the only premises which can be lawfully used for the
"slaughter of live stock within municipal limits; or in
"fine, as has been done many times in this and other
"States, to confer on favored corporations an irrevocable
"exemption from the common burdens of equal taxation,
"either by exacting from them an inconsiderable *bonus*
"in commutation of all future taxation, or else exacting
"from them no taxes at all. The following cases illus-
"trate monoplies of this kind, so often conferred by leg-
"islative franchises: New Orleans Gas Light Company
"vs. Louisiana Light Co., 115 U. S., 650; New Orleans
"Water Works Co. vs. Rivers, 115 U. S., 674; The Bing-
"hamton Bridge, 3 Wallace, 51; City of Chicago vs. Rumpf
"45 Illinois, 90; Slaughter House Cases, 16 Wallace, 36;
"Gale vs. Kalamazoo, 23 Mich., 344; S. C., 9 American
"Rep., 80; Atlantic City Water Works vs. Atlantic City,
"39 N. J. Eq.; S. C., 10 Amer. & Eng. Corp. Cases, 59;
"Norwich Gas Light Co. vs. Norwich City Gas Co., 25
"Conn., 19; Mobile R. R. Co. vs. Kennerly, 74 Ala., 566;
"Daughdrill vs. Alabama Life Ins. Co., 31 Ala., 91; Home
"of the Friendless vs. Rouse, 8 Wallace, 430. The very
"fact that the legislature could, according to the better
"view, make irrevocable grants of this nature, was the
"very reason, no doubt, why the organic law was made

"so as to prohibit such grants in the future. In the "struggling infancy of the States and communities, the "temptation has been very great to offer them, as a re- "ward to the investment of capital. The injustice and "inequality of their operation have only been illustrated "in the light of the rapid increase of our population, the "steady growth of our wealth and the wonderful discov- "eries of modern science. It now more fully becomes "manifest that they prove iron bands to fetter the growth "of public industry, enterprise and commerce. Free "competition in all departments of commercial traffic is "justly deemed to be the life of a people's prosperity. "The policy of the law, as now declared by our constitu- "tion, is as clear in the condemnation of the grant of irre- "vocable exclusive privileges conferred by franchise, as "that of the common law was in the reprobation of pure "monopolies which were always deemed odious, not only "as being in contravention of common right, but as "founded in the destruction of trade by the extinguish- "ment of a free and healthy competition. The case of "the Monopolies, 11 Rep., 84.

"*The exclusive right of the appellee to the privilege "claimed, in our opinion, cannot be sustained. The Gen- "eral Assembly would itself have no power under the "constitution to make such a grant*"

This court has steadfastly adhered to the principle that it would follow the construction put upon the constitution of a state by its highest court.

Polk vs. Wendell, 9 Cranch, at middle of page 98.

Merchants and Manufacturers Bank vs. Pennsylvania, 167 U. S., at page 462.

Fall Brook Irrigating District vs. Bradley, 164 U. S., bottom of page 154.

Wilson vs. State of North Carolina, ex rel Caldwell, 169 U. S., bottom of page 592;

Brown vs. New Jersey, 175 U. S., page 174;

Erb as Receiver vs. Morasch, 177 U. S., 584.

The charter of the appellant was granted by the General Assembly of Alabama more than seven years after the ratification and adoption of the present Constitution of Alabama. Under the decision of the Supreme

Court of Alabama quoted above at length, it seems clear that no exclusive privilege of supplying water could pass to appellant by virtue of its charter and the amendment of February 14th, 1885, set out int he bill, because the General Assembly had no power to grant an exclusive right or privilege. It is to be specially noted that section 11 of the original charter of the appellant conferred upon it in clear and express language an exclusive privilege to supply water to the city of Mobile and its inhabitants as soon as it obtained the right to bring water from Three Mile creek, (Record, page 69.) Why was it when the charter of the company was amended on its initiative, February 14th, 1885, (Record, pages 2 and 72) section 11 of the charter of appellant was made to read: "But nothing in this act shall be construed, &c." Was not section 11 of the charter so amended to make it conform to the Constitution of Alabama?

II

We contend that an exclusive privilege will not be held by the courts to have been granted unless it is done in clear and unequivocal language. As shown in the bill of complainant (Record page 2), the section of its charter in which it is claimed that an exclusive privilege was conferred, contains the following: "*But nothing in this Act shall be construed to prohibit the organization hereafter of any company for the purpose of supplying the City of Mobile or any other place with water which does not interfere with the property rights or rights of obtaining water pertaining to this company.*" This language we submit negatives the idea that it was the intention of the General Assembly to confer upon the appellant the exclusive privilege of supplying water to the City of Mobile and its inhabitants. We contend that the principle is firmly established in the jurisprudence of our country that an exclusive privilege can only be created when the language used is such as to leave no reasonable doubt. The principle is stated with unusual force by Mr. Chief Justice Marshall in United States vs. Fisher, 2 Cranch, 390. "When rights are infringed, where fundamental principles "are overthrown, where the general system of the laws is

"departed from the legislative intention must be expressed "with irresistible clearness to induce a court of justice to "suppose a design to effect such object."

In the Binghampton Bridge case, 3 Wallace, 51, Mr. Justice Davis, for this court, said: "The principle is "this, that all rights which are asserted against the "State must be clearly defined, and not raised by infer- "ence or presumption; and if the charter is silent about "a power, it does not exist. If, on a fair reading of the "instrument, reasonable doubts arise as to the proper "interpretation to be given to it, those doubts are to be "solved in favor of the State; and where it is susceptible "of two meanings, the one restricting and the other ex- "tending the powers of the corporation, that construc- "tion is to be adopted which works the least harm to the "State." This language is quoted and approved by this court, through Mr. Justice Harlan in Stein vs. Bienville Water Supply Company, 141 U. S., 67.

In Pennsylvania Railroad Company vs. Canal Commissioners, 21 Pa., St. Reports, 22, the principle is thus stated by the Supreme Court of Pennsylvania:

"When a State means to clothe a corporate body "with a portion of her own sovereignty and to disarm "herself to that extent of the power that belongs to her, "it is so easy to say so that we will never believe it to be "meant when it is not said. In the construction of a "charter to be in doubt, is to be resolved, and every res- "olution which springs from doubt, is against the cor- "poration."

III.

If it should be held that the amended charter of the Bienville Water Supply Company as the same appears in the Acts of Alabama, 1884-5, pages 489-91, (Record, pages 72-73,) contains the grant of an exclusive privilege to the Bienville Water Supply Company of supplying the City of Mobile and its inhabitants with water, then we submit that it was repealed by the act of the General Assembly of Alabama, entitled "An act to amend an act entitled "An act to amend sections one, five and eleven of an act to incorporate the Bienville Water Supply Company, ap-

proved February 19th, 1883," Approved February 23rd, 1899. Local Acts of Alabama 1898-9 page 1689 (Record page 21.), and that any such exclusive privilege was also repealed by an act of the General Assembly of Alabama, entitled, "An act to authorize the City of Mobile to provide, maintain and operate systems of water works and sewerage." Approved November 30th, 1898, Local Acts of Alabama 1898-9 page 19. (Record, page 43.). In the case of Bibb vs. Hall & Farley, 101 Alabama, bottom of page 98 the Supreme Court of Alabama, said:

"Generally speaking, the rights of a corporation are "determined by the law in force when it came into being, "though it cannot be denied that by the laws of this "state, the charter of either of these companies was sub- "ject to amendment or repeal by future legislation. Art- "icle XIV, Section 10 Const. of Ala.; Chesapeake and "Ohio R. R. Co. vs. Miller, 114 U. S. 189."

In the case of the Hamilton Gas Light and Coke Co. vs. City of Hamilton 146 U.S. 258, this court through Mr. Justice Harlan said: "*Accepting, as we do, this decision of the "highest court of the state as correctly interpreting the "legislative will*, and, therefore assuming that the legis- "lature intended by Section 2486 to confer authority upon "the City of Hamilton to erect gas-works at its expense, "whenever deemed by it expedient or for the public good "to do so, the next contention of the plaintiff is that such "legislation is within the constitutional inhibition of "state laws impairing the obligation of contracts. This "view is inadmissible. The statutes in force when the "plaintiff became a corporation did not compel the city "to use the gaslight furnished by the plaintiff. The city "was empowered to contract with the company, for light- "ing streets, lands, squares, and public places with- "in its limits, but it was under no legal obliga- "tion to make a contract of that character, although "it could regulate, by ordinance, the price to be "charged for gas light supplied by the plaintiff "and used by the city or its inhabitants. It may be "that the stockholders of the plaintiff supposed, at the "time it became incorporated, and when they made their "original investment, that the city would never do what

"evidently is contemplated by the ordinance of 1889. "And that it may be that the erection and maintenance "of gas works by the city at the public expense and in "competition with the plaintiff, will ultimately impair, "if not destroy, the value of the plaintiff's works for the "purposes for which they were established. But such "considerations cannot control the determination of the "legal rights of the parties. * * * * * * * * * * "If the statute under which the plaintiff became incor- "porated be construed as giving it the exclusive privi- "lege, so long as it met the requirements of law, of sup- "plying gas light to the City of Hamilton and its inhabi- "tants by means of pipes laid in the public ways, there "is no escape from the conclusion that such a grant, as "respects, at least, its exclusive character, was subject "to the power of the legislature, reserved by the State "constitution, of altering or revoking it. This reserva- "tion of power to alter or revoke a grant of special priv- "ileges necessarily became a part of the charter of every "corporation formed under the general statute providing "for the formation of corporations. A legislative grant "to a corporation of special privileges, *if not forbidden "by the constitution*, may be a contract, but where one of "the conditions of the grant is that the legislature may "alter or revoke it, a law altering or revoking, or which "has the effect to alter or revoke, the exclusive charac- "ter of such privileges, cannot be regarded as one im- "pairing the obligation of the contract, whatever may "be the motive of the legislature, or however harshly "such legislation may operate, in the particular case, "upon the corporation or parties. The corporation, by "accepting the grant subject to the legislative power so "reserved by the constitution, must be held to have as- "sented to such reservation."

IV.

We insist that when the General Assembly of Alabama enacted the laws authorizing the City of Mobile to construct and operate water works, and the act of February 23rd, 1899, amending the charter of the Bienville Water Supply Company, repealing any alleged exclusive

privilege of that company, that whether the General Assembly acted under Article I, Section 23; Article XIV, Section 10, or Article XIV, Section 1 of the Constitution of Alabama, all questions affecting the expediency and just operation of said laws, under the power vested in the General Assembly by the constitution, were settled when said laws were passed. We contend that all questions in reference to the injury suffered by the appellant upon the repeal of the alleged exclusive privilege, and the just operation of the act were necessarily matters "of legislative discretion, and on questions such as this, not one of judicial determination." It is perfectly clear that the courts cannot interfere with matters of legislative discretion. Fox vs. McDonald, 101 Alabama, at the middle of page 65; Clarke vs. Jack, 60 Alabama, 278; Mageun vs. Illinois Trust and Savings Bank, 170 U. S., bottom of page 298.

In Spring Valley Water Works vs. Schottler, 110 U. S., 374, near the close of the opinion Mr. Chief Justice Waite said: "The power to amend corporate charters is no doubt one that bad men may abuse, but when the amendments are within the scope of the power, the courts cannot interfere with the discretion of the legislatures that have been invested with the authority to make them." See also License Tax Case, 5 Wallace, 469; Perry vs. Keene, 56 N. H., 514.

In Attorney General vs. Chicago, etc. R. R. Co., 35 Wisconsin, page 576, Chief Justice Ryan says: "It seems to us that the legislature is the sole judge of the reasonable nature of the alteration, as it is the sole judge of the reasonable nature of the original charter." Cooley's Const. Limitations, 5th Edition, pages 52, 200, 201 and 263, and authorities cited.

In the case of the United States vs. Arredondo, 6 Peters, at the bottom of page 729, Mr. Justice Baldwin for this court said: "It is a universal principle that, "where power or jurisdiction is delegated to any public "officer or tribunal over a subject matter, and its exercise "confided to his or their discretion, the acts so done are "binding and valid as to the subject matter, and individual rights will not be disturbed collaterally for anything done

in the exercise of that discretion within the authority and power conferred. The only question that can arise between an individual claiming a right under the acts done, are, power in the officer, and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer, whether executive judicial or legislative, unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal prescribed by law." See 3rd American and Eng. Ency of Law, 1st Edition, page 684.

V.

The Act of the General Assembly of Alabama, entitled, "An act for the promotion of the health and convenience of the City of Mobile by the introduction of a supply of wholesome water into said city, to be used for domestic purposes and the extinguishment of fires." Approved January 7th, 1841, (Record, page 173,) confirmed the contract made between Albert Stein and the City of Mobile of December 26th, 1840, whereby said city secured the right to acquire the Stein or Mobile City Water Works after twenty years from said date, "or any further time," (Stein vs. Bienville Water Supply Co., 141 U. S., 67,) and to take water from Three Mile Creek. The City of Mobile secured in the manner provided for in the contract of December 26th, 1840, by arbitration, 45.72 per cent. of the property and interests in the Stein water works, (Record, pages 61 and 83,) and anticipating that it might fail under the arbitration proceedings to secure the remaining 54.28 per cent in said water-works system owned by Mr. Walter Wood, the Treasurer of the Bienville Water Supply Company (Record, page 105.), it secured before Cause No. 208 set out in the record from pages 73 to 98, was submitted for decision or decided in the Circuit Court of the United States at Mobile, the passage by the General Assembly of Alabama of the act entitled, "An Act to authorize the City of Mobile for the purpose "of aiding in the erection of its municipal water works, "to condemn by eminent domain the outstanding in-"terest in what is known as the Mobile City Water "Works." Approved December 10th, 1898. Local Acts of

Alabama, 1898-9, page 139. (Record, page 27.) The City of Mobile filed the necessary application to condemn the outstanding interests of the Stein or Mobile City Water Works, in the Probate Court of Mobile county, two days after the decision in the arbitration suit between the City of Mobile and Walter Wood was decided, and eight days before the bill in this cause was filed, (Record, pages 61-64) and has condemned said interest, as shown by the decision of the Supreme Court of Alabama in the case of the State of Alabama, ex rel Walter Wood vs. Price Williams, Jr., Judge of Probate, 28 Southern Reporter, page 401.

That the General Assembly of Alabama had the power to authorize the City of Mobile to obtain the outstandlng interest not owned by it, in the Stein Water Works. See New Orleans Gaslight Company vs. Louisiana Light, etc. Mfg. Company, 115 U. S., page 673; Shoemaker vs. United States, 147 U. S., at page 298; Railroad Company vs. B. S. and Tenn. River R. R. Co., 96 Alabama, 576; Railroad Company vs. Railroad Company, 82 Alabama, bottom of page 299; Cooley's Constitutional Limitations, 5th Edition, page 558; Steele vs. County Commissioners, 83 Alabama, 304; 10th American and English Ency. of Law, 2nd Edition, page 1091.

As we have heretofore said, the right to acquire the Stein Water Works was conferred upon the City of Mobile by a certain contract, based upon valuable considerations, entered into by and between Albert Stein and said city, dated December 26th, 1840, ratified by the act of the General Assembly of Alabama of January 7th, 1841, and passed upon by this court in Stein vs. Bienville Water Supply Company, 141 U. S., 67. The contract was made and ratified by the Legislature of Alabama thirty-four years before the ratification and adoption of the present Constitution of Alabama of 1875, and vested a right of property in the City of Mobile to acquire and operate the Stein system of water works and this contract right cannot be divested out of the city by any change in the organic law of the State, even if Article 1, Section 37 and Article 4, Sections 50, 54 and 55 of the present constitution have, which we deny, the

effect claimed by appellant's counsel. See New Orleans Gas-light Company vs. Louisiana Light etc Mfg. Co. 115 U. S. 672; Town of Pawlett vs. Clark, 9 Cranch 292; Grogan vs. San Francisco, opinion by Chief Justice Field, 18 California 590-612; Mount Hope Cemetery Company vs. City of Boston 158 Mass. 509, same case 35 American State Reports 515, with an elaborate note by Mr. A. C. Freeman. This same contention which is put forward in the amended bill (Record, page 65) that under the present constitution of Alabama, the City of Mobile had and has no power to operate water-works, was pressed upon this court by the present counsel for appellant, at the bottom of page four of their brief in Bienville Water Supply Company vs. Mobile, 175 U. S., 109.

VI.

In the answer of the defendants they have insisted that the appellant was not entitled to an injunction upon the ground that it stood by and let the work of securing city ownership of water works begun in July, 1897, proceed without let or hindrance until the bonds had been issued, contracts made and being rapidly executed before it sought the protection of the courts. The defendants adopted in their answer the language of Mr. Justice White in the Penn. Mutual Life Ins. Co. vs. Austin, 168 U. S., at page 701. (Record, page 34.) We think the laches of the appellant comes clearly within the rule as stated in the case last cited.

In conclusion, we submit that if our contention and the conclusion of the Circuit Court is correct, that the Bienville Water Supply Company did not have an exclusive privilege of supplying the City of Mobile and its inhabitants with water until July 1st, 1908, then there was and is no federal question in this cause. If appellant had no exclusive privilege then there could be no impairment of the contract in violation of the Constitution of the United States under the case made by the bill. The appellant and the appellees are citizens of the State of Alabama; the federal question depended upon the averment in the bill that the exclusive privilege granted to the appellant by the State of Alabama was being violated in

defiance of the Constitution of the United States. What was said by this court through Mr. Justice Peckham in McCain vs. DesMoines, 174 U. S., at page 181, we think appropriate to the case at bar: "Such being the law of Iowa, " we are of the opinion that an allegation in the bill that " this is a controversy and a suit of a civil nature arising " under the Constitution and laws of the United States is " not supported by the facts appearing in the bill. The " facts alleged must show the nature of the suit, and it " must plainly appear that it arises under the Constitution " or laws of the United States; that is, there must be a real " and substantial dispute as to the effect or construction of " the constitution or some law of the United States, upon " the determination of which the controversy depends. * " * * * The allegation that the suit arises under the Con- " stitution of the United States is so palpably unfounded " that it constitutes not even color for the jurisdiction of " the Circuit Court."

We respectfully urge that there is color for the motion to dismiss, and that the motion to affirm should be sustained.

Wilson vs. North Carolina, ex rel Caldwell. 169 U. S., middle of page 595.

Bienville Water Supply Company vs. Mobile, 175 U. S., 109.

City of Chanute vs. Trader, 132 U. S., 210.

Craemer vs. State of Washington, 168 U. S., at page 131.

All of which is respectfully submitted.

B. B. BOONE,
E. L. RUSSELL,
Counsel for Appellees.

No. 374 October Term, 1900.

Supreme Court of the United States.

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Appellant,

vs.

THE CITY OF MOBILE AND JOHN CURTIS BUSH,
Mayor thereof, Appellees.

ADDITIONAL BRIEF FOR THE APPELLEES IN REPLY TO BRIEFS OF APPELLANT UPON THE MOTIONS OF THE APPELLEES TO DISMISS OR AFFIRM.

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Mayor thereof.

BRIEF OF THE APPELLEES IN REPLY TO THE BRIEFS OF THE APPELLANT.

We respectfully urge that no one can read the Constitution of Alabama of 1875, and not be impressed with the fact that it was the manifest intention of the framers of that instrument when they adopted Article I, Section 23, known as the declaration of rights, and Article XIV, Sections 1 and 2, to retain and secure to the people of Alabama, full power and control over corporate franchises, which might be granted; a power and authority which the State would be deprived of without such reservation, by the federal constitution, as that instrument has been interpreted by this court in the Dartmouth College and subsequent cases, and followed by the Supreme Court of Alabama in many of its decisions. The charter of the appellant was created under Article XIV, Section 1, being a case where in the judgment of the General Assembly the objects of the corporation could not be attained under general laws. Said section of the Constitution provides that "all general laws and special acts passed pursuant to 'THIS SECTION' may be altered, amended or repealed." The franchise of the appellant being created by the General Assembly under the power conferred in Article XIV, Section 1, it seems to us to be

free from doubt that when the General Assembly altered, amended or repealed the law it had passed under that section of the constitution, that the judgment of the General Assembly cannot be enquired into or controlled by the courts, any more than they could enquire into and control the judgment of the General Assembly in passing the original law creating the appellant. And so we believe it was the intention of the framers of the Constitution of Alabama, in Article XIV, Section 10, to provide against any injury to the material, physical property and rights of corporations, "but that the franchises of corpo-"rations, as comports with the dignity and safety of the "State should be subject to the power which grants them, "that corporations should exist as the subordinates of "the State, which is their creator." The Attorney General vs. Railroad Companies, 35 Wisconsin, page 574.

II.

What did the General Assembly of Alabama mean when it used the language in Section eleven of the charter of the appellant? (Record, pages 2 and 73): "*But "nothing in this act shall be construed to prohibit the or-"ganization hereafter of any company for the purpose "of supplying the City of Mobile or any other place with "water which does not interfere with the property rights "or rights of obtaining water pertaining to this com-"pany?*" No other company could be organized for supplying water to the City of Mobile without affecting the franchise of the appellant, and hence it must have been the intention of the legislature to guard the appellant against any interference with its material, physical property, its pumps, machinery, pipes, etc., by the words "property rights;" and that the words were used in their popular sense. In Spencer vs. State, 5 Indiana, 41, it is said: "In statutory exposition, the reason, the spirit of "the law, is above the mere cavil about words." In People vs. Lacombe, 99 New York, 43, it is said: "It is "the spirit and purpose of a statute which are to be re-"garded in its interpretation; and if these find fair ex-"pression in the statute, it should be so construed as to "carry out the legislative intent, even although such

"construction is contrary to the literal meaning of some "provisions of the statute." In Commonwealth vs. Kimball, 24 Pickering, 370, Chief Justice Shaw said: "It "is unquestionably a well settled rule of construction "applicable as well to penal statutes as others, that when "the words are not precise and clear, such construction "will be adopted as shall appear most reasonable and "best suited to accomplish the objects of the statute."

This court has decided "that every public grant of "property, or of franchises, if ambiguous, is to be *con-"strued against the grantee* and in favor of the public."

Central Transp. Co. vs. Pullman Palace Car Co., 139 U. S., 24.

Oregon River & Navigation Co. vs. Oregonian R. R. Co., 130 U. S., 1.

In the Central Transportation Company vs. Pullman's Palace Car Co. case, in which the present counsel for the appellant in this case. Mr. John G. Johnson, was counsel for the appellant in that case, Mr. Justice Gray for this court said:

"By a familiar rule, every public grant of property, "or of privileges or franchises, if ambiguous, is to be "construed against the grantee and in favor of the pub-"lic; because an intention on the part of the government "to grant to private persons, or to a particular corpora-"tion, property or rights in which the whole public is in-"terested, cannot be presumed, UNLESS UNEQUIVOCALLY "EXPRESSED OR NECESSARILY TO BE IMPLIED in the terms "of the grant; and because the grant is supposed to "be at the solicitation of the grantee, and this rule of con-"struction is a wholesome safeguard of the interests of "the public against any attempt of the grantee, by the "insertion of ambiguous language, to take what could "not be obtained in clear and express terms." Again, this court has decided that in every statute granting a privilege, it is to be construed most strongly against the grantee.

Hannibal & St. J. R. R. Co. vs. Missouri River Packet Co., 125 U. S., 260.

In Section 11 of the amended charter of appellant, (Record, pages 2 and 73) the legislature put, in the words

we have quoted above, an interpretation upon the privilege granted, and when that section is compared with the same section in the original charter (Record, bottom of page 69) it will be found radically different. A statute may contain an interpretation clause.

Farmer's Bank vs. Hale, 59 New York, 57.
United States vs. Gilmore, 8 Wallace, 330.

In the search for the intent of the framers of the constitution or an Act of the General Assembly it is familiar law that the court will look to each and every part thereof, to the old law upon the subject, and to the evils and mischiefs intended to be remedied.

III.

The original charter of the Bienville Water Supply Company in Section 11, (Record, page 69,) and the same as amended by the act of February 14th, 1885, (Record, page 72,) provided that the appellant should enjoy the right of "bringing water from any point other than "Three Mile Creek, in the county of Mobile, for the sup- "ply of said port of Mobile and village of Whistler, for "the period of twenty years from the time when said "water shall have been brought within the limits of the "Port of Mobile, and be ready for distribution, and sup- "ply to the inhabitants of the Port of Mobile, AND THE "HOUSES AND DWELLINGS WITHIN THE LIMITS OF SAID "PORT."

The sworn answer of the appellees charges that this requirement of the charter of appellant had never been complied with, (Record, Page 22,) "because defendants "say that it has never up to the date of filing this answer "had the water ready for distribution and supply, ex- "cept to a portion of the inhabitants of said city. Fur- "ther answering defendants say that upon many of the "streets of said city, amounting to miles and miles of "streets, there is no protection against fire, owing to the "fact that said water supply company has not laid "its mains on those streets, and hence could not erect "fire hydrants or plugs thereon." The answer is responsive to the allegations of the bill, which called for it

under oath, and must be overcome by the testimony of two witnesses, or one witness with corroborating circumstances.

Latta vs. Kilbourn, 150 United States, 524.

The testimony of D. M. N. Ross, (Record, page 146,) C. B. Percy, (Record, page 158,) Matthew Sloan, (Record, pages 163, 164 and 165,) fully support the charge made in the answer of appellees, that the appellant has never complied with the conditions contained in Section 11 of its charter, and has not therefore secured an exclusive privilege even if it be held that such privilege was to be enjoyed by it upon complying with the conditions precedent imposed in its charter. Conditions precedent must be performed before franchises vest.

Bonham vs. Taylor, 10 Ohio, 108.
Middle Bridge vs. Brooks, 13 Maine, 391, S. C.
29 American Decisions, 510.
People vs. Kingston T. R. R. Co., 23 Wendell, 193.

III.

In the additional brief of the appellant on page 2, it is claimed that the appellant is now supplying the City of Mobile with water under a contract. The contracts made exhibits to the bill, show that they expired by limitation on July 1st, 1900.

Bienville Water Supply Company, vs. Mobile, 175 U. S. 109.

In conclusion, we respectfully state that the water-works which the City of Mobile was authorized by the General Assembly of Alabama to build, has been completed and is now in operation, and that the $750,000 in bonds that said city was authorized to issue to pay for said water-works and sewer systems, have been issued, and are now in the hands of bona fide purchasers for value.

All of which is respectfully submitted.

B. B. BOONE,
E. L. RUSSELL,
Counsel for Apellees.

No. 126.

Brf. of Boone & Russell for Appellees

Office Supreme Court U.S.
FILED
DEC 9 1901
JAMES H. McKENNEY,
Clerk

No. 126. October Term, 1901.

Filed Dec. 9, 1901.

In the Supreme Court of the United States

THE BIENVILLE WATER SUPPLY COMPANY,
Appelant,

vs.

THE CITY OF MOBILE AND JOHN CURTIS BUSH,
Mayor Thereof, Appellees.

BRIEF FOR THE APPELLEES UPON THE MERITS.

B. B. BOONE,
E. L. RUSSELL,
Counsel for Appellees.

In the Supreme Court of the United States

OCTOBER TERM, 1901.

No. 126.

THE BIENVILLE WATER SUPPLY COMPANY,
Appellant,

VS.

THE CITY OF MOBILE, et al., Appellees.

BRIEF OF THE APPELLEES ON THE SUBMISSION OF THE CAUSE ON THE MERITS.

We contended in our briefs filed in support of the motions of the appellee to dismiss or affirm, (which motions were by the order of this court made on October 22nd, 1900, continued until this cause should come on for hearing upon the merits), that the General Assembly of Alabama was authorized by Article 1, Section 23, and Article XIV, Sections 1, 2 and 10 of the Constitution of Alabama, to amend, alter or revoke the charter of any corporation created since the adoption of the Constitution of 1875, whenever in the opinion of the General Assembly such charter was injurious to the citizens of the State; and that the General Assembly was the sole and final judge as to when a charter was injurious to the citizens of the State; and also was sole judge as to what was necessary to be done in amending or repealing a charter, (*the franchise*), so that no injustice shall be done to the corporators.

Counsel for the appellant in their briefs in opposition to the motions to dismiss or affirm, assert that we have cited to this court no authorities in support of our contention, so we will now cite additional authorities.

The following provisions of the Constitution of Alabama of 1875, contain the power reserved by the State to

alter, amend or revoke the charters of corporations created by it.

Article I, Section 23: "That no expost facto law, or "any law impairing the obligation of contracts, or "making any irrevocable grants of special privileges or immunities, shall be passed by the General Assembly."

Article XIV, Section 1: "Corporations may be "formed under general laws, but shall not be created by "special act, except for municipal, manufacturing, "mining, immigration, industrial, and educational pur- "poses, or for constructing canals, or improving navi- "gable rivers and harbors of this State, and in cases "where, in the judgment of the General Assembly, the "objects of the corporation cannot be attained under "general laws. All general laws and special acts passed "pursuant to this section may be altered, amended, or "repealed."

Article XIV, Section 2: "All existing charters or "grants of special or exclusive privileges, under which a "bona fide organization shall not have taken place and "business been commenced in good faith, at the time of "the ratification of this Constitution, shall thereafter "have no validity."

Article XIV, Section 10: "The General Assembly "shall have the power to alter, revoke, or amend any "charter of incorporation now existing, and revocable "at the ratification of this Constitution, or any that may "thereafter be created, whenever, in their opinion, it "may be injurious to the citizens of the State; in such "manner, however, that no injustice shall be done to the "corporators. No law hereafter enacted shall create, "renew, or extend the charter of more than one corpora- "tion."

It will be observed that the only difference between Article XIV, Section 10, of the Constitution of Alabama, and Article XVI, Section 10 of the Constitution of Pennsylvania, is that in the Alabama Constitution the word "State" is used, and in the Pennsylvania Constitution the word "Commonwealth" is found.

Article XVI, Section 10, of the Constitution of the State of Pennsylvania, is as follows :

"The General Assembly shall have the power to "alter, revoke or annul any charter of incorporation "now existing and revocable at the adoption of this "Constitution, or any that may hereafter be created, "whenever in their opinion it may be injurious to the "citizens of this commonwealth, in such manner, how-"ever, that no injustice shall be done to the corporators."

In the case of the Wagner Free Institute vs. Philadelphia, 132 Penn. State Reports, 612; same case, 19 American State Reports 613, the Supreme Court of Pennsylvania, through Mr. Justice Mitchell, said: "But "this case has been argued and may be confidently "rested on broader grounds. Counsel have presented "two questions, assuming that the real estate in this "case is an endowment: 1. Can the State repeal the "exemption? and 2. Has it done so? Upon the first "question, there can be no substantial doubt. The ex-"emption can only exist by virtue of the amended char-"ter of 1864. But this, of course, is subject to the legis-"lative power, under the amendment of 1857, to the Con-"stitution, to alter, revoke, or annul any charter there-"after granted. Under the Constitution of the United "States and the decisions of the Supreme Court, a char-"ter is ordinarily a contract; but a charter which is re-"vocable at the will of the grantor is only a quasi con-"tract, and approaches much more closely to the charac-"ter of a license. To such a charter the rule of the "Dartmouth College case does not apply, and the deci-"sions are uniform to this effect. No question under the "Constitution of the United States, therefore arises in "this case.

"But it is argued that the legislative right of revo-"cation only exists when the privileges granted become "'injurious to the citizens of the commonwealth,' and "that the legislature is not the final and absolute judge "of what is so injurious. Expressions frem the opinions "of this court in several cases are cited in support of this "argument, but none of the decisions, examined upon "their facts, really sustain the contention of the appel-

"lant here. The strongest expression is found in Com-
"monwealth vs. Pittsburg, etc., R. R. Co., 58 Pa., St. 26,
"where Sharswood, J., says: "That case (Erie, etc., R.
"R. Co. vs. Casey, 26 Pa. St., 287) must be considered
"as authority in this State for the position that the legis-
"lature is not the final judge of whether the casus
"foederis, upon which the authority to repeal is based
"has occurred." This language is quoted with approval
"by Gordon, J., in Hays vs. Commonwealth, 82 Pa. St.,
"12, and this latter case, in turn, by the present Chief
"Justice in Williamport Pass R. R. Co.'s Appeal, 120 Pa.
"State, 12. But in Commonwealth vs. Pittsburg, etc.,
"R. R. Co., 58 Pa. St., 26, the charter involved was
"granted before 1857, and by its terms limited the power
"of repeal to the contingency of "misuse or abuse of the
"privileges granted;" and it was of this provision that
"Justice Sharswood used the language quoted. The case
"itself turned on the railroad company's denial of any
"violation of its charter since a condoning statute, and
"the admission of the truth of that defense by the com-
"monwealth's demurrer. Hays vs. Commonwealth, 82
"Pa. St., 523, and Williamsport Pass. R'y Co.'s Appeal,
"120 Pa. St., 12, decide only that the present Constitu-
"tion does not repeal charters previously granted; and
"the general language of the opinions is used with ref-
"erence to the intent of the instrument, rather than to
"the power to repeal if the intention to do so were clear.

"The language of the Constitutional Amendment of
"1857, is, that the legislature may alter or revoke any
"charter whenever, "in their opinion, it may be injuri-
"ous." The same language is repeated in the present
"Constitution, Article XVI, Section 10. Exemptions
"from taxation is a subject of inherent public interest.
"It is a dimunition of a supreme prerogative of the State
"to raise revenue necessary to its existence. It is at all
"times a legislative question, and we do not see how the
"right of the legislature to determine whether, in any
"particular class of cases, an exemption is "injurious to
"the commonwealth" can be doubted; and by the first
"section of Article IX of the Constitution, the legisla-
"ture is imperatively restricted to dealing with it by

"general laws. We think it clear, therefore, that the "legislature, under the authority reserved by the Consti- "tution of 1857, could at any time repeal the exemption "in the plaintiff's charter, and do so by a general law."

The Constitution of Arkansas of 1874, Article XII, Section 6, ordains: "Corporations may be formed under "the general laws; which laws may, from time to time, "be altered or repealed. The General Assembly shall "have the power to alter, revoke, or annul any charter "of incorporation now existing and revocable at the "adoption of this Constitution, or any that may here- "after be created, whenever, in their opinion, it may be "injurious to the citizens of this State; in such manner, "however, that no injustice shall be done to the corpor- "ators."

In Leep vs. St. Louis, etc., Ry. Co., 58 Arkansas, page 428, Battle, Justice, after quoting the Constitution of 1874, as above set out and referring to the Constitution, said: (bottom of page 427 and page 428) "But "what is true of persons is not always true of corpora- "tions. Natural persons do not derive the right to con- "tract from the legislature. Corporations do. They "possess only those powers or properties which the char- "ters of their creation confer upon them, either expressly "or as incidental to their existence; and these may be "modified or diminished by amendment or extinguished "by the repeal of the charters. * * * * Under "these Constitutions the General Assembly has enacted "statutes providing for the organization of corporations; "and from them the corporations of this State derive "their powers subject to the power of the legislature to "change them by amending the laws under which they "were organized." After quoting many of the decisions of this court discussing the reserved power of States to amend charters granted by them, the learned Justice thus continues at page 435: "Whenever the charters of "railroad companies become obstacles in the way of the "legislature so regulating their roads as to make them "subserve the public interest to the fullest extent practi- "cable, their charters are, in that respect, injurious to "the citizens of the State, and can be amended, as to de-

"fects, in such manner as will be just to the corporators. "For they are organized for a public purpose, and their "roads are declared by the Constitution to be public "highways, and they are made common carriers. They "are clothed with a public trust and, in many respects, "are expressly subjected by the Constitution to the con- "trol of the legislature. There is no enterprise in which "the public is so largely interested as it is in the success- "ful and efficient operation of railroads. With the trust "with which they are clothed is imposed the duty to "serve the public as common carriers in the most efficient "manner practicable. For this reason the legislature "may impose upon them such duties as may be reason- "ably calculated to secure such results. Being created "by statute, the legislature may so change them by "amendment as to make them subserve the purpose for "which they were created"

In St. Louis, Iron Mountain and Southern Railway Company vs. Paul, 64 Arkansas, at page 83; same case, 62 American State Reports, 154, referring to the provision of Article XII, Section 6, of the Constitution of Arkansas, the Supreme Court of that State said: "The "powers conferred upon them by their charters may be "modified or diminished by amendment, or extinguished "by the repeal of the charters." At page 89 the court said: "The act of March 25, 1889, does not interfere "with the disposition or control of the property of rail- "road companies, with their vested rights, or with con- "tracts already made. All it requires them to do is to "pay the wages earned by their servants or employes "under contract entered into after its enactment, at the "time they discharge them or refuse to give them further "employment. The effect of this requirement is to make "the wages payable at the time of the discharge or re- "fusal to employ, and to limit the right to contract. But "this right was derived from the laws under which the "railroad companies were organized, and, according to "the cases cited, (decisions of this court) was subject to "be limited, regulated and controlled by the general "assembly, under the constitution of this State, WHEN- "EVER, IN ITS OPINION, it may be beneficial to the public,

"in such manner as may be just to the corporators. "Consequently, no right of the railroad companies was "violated by the act limiting the right to contract." This case was affirmed by this court on a writ of error to the Supreme Court of Arkansas, in St. Louis, Iron Mountain and Southern Railway Company vs. Paul, 173 U. S., 404.

The Constitution of Georgia of 1877, provides: (Code of Georgia, 5731, (5026) Par. 3. "No grant of special privi- "leges or immunities shall be revoked, except in such "manner as to work no injustice to the corporators or "creditors of the corporation."

It will be observed that this instrument does not contain the provision, "whenever in their opinion it may be "injurious to the citizens of the State," as is the case in the Constitutions of Alabama, Pennsylvania and Arkansas, and yet it was held by the Supreme Court of Georgia in construing this constitutional provision, that the amendment of a charter under the reserved power in the Constitution, was primarily a legislative question. In speaking of the provision of the Constitution of Georgia, above quoted, the Supreme Court of Georgia, through Chief Justice Bleckley, in Macon and Birmingham R. R. Co. vs. Gibson, 85 Georgia, 1, said:

"If such an alteration as this cannot be made, "(changing the route of a railroad through a county), it "is difficult to imagine any material alteration that "could be made; and, of course, if the reserved power "of changing, modifying and destroying will not em- "brace material alterations, the reservation is useless "and worthless. No part of the company's line in Upson "County being yet constructed, none of the company's "property is taken or destroyed by the amendment. A "portion of the franchise to locate the line at will is "withdrawn, and the amendment takes away nothing "else; it simply resumes what the State could have "withheld in granting the charter if the legislature had "been so disposed. For this reason, if not for others, "such cases as Detroit vs. Detroit, etc., Road Co., 43 "Mich., 140, are without application to the question be- "fore us. The authorities more directly in point are "such as Tomlinson vs. Jessup, 15 Wall., 454; Miller vs.

"State, 15 Wall., 478; and Railroad Company vs. Geor-
"gia, 98 U. S., 359. Where an attempt is made to deprive
"a corporation of its *property* by amending its charter,
"doubtless the observations of Cooley, J., in Detroit vs.
"Detroit, etc., Road Company, 43 Mich., 140, ought to be
"recognized as sound. He says: "But for the provi-
"sion of the Constitution of the United States which
"forbids impairing the obligations of contracts, the
"power to amend or repeal corporate charters would be
"ample without being expressly reserved. The reserva-
"tion of the right leaves the State where any sovereignty
"would be if unrestrained by express constitutional lim-
"itations, and with the powers which it would then pos-
"sess. It might therefore do what it would be admis-
"sible for any constitutional government to do when
"not thus restrained, but it could not do what would be
"inconsistent with constitutional principles. And it can
"not be necessary at this day to enter upon a discussion
"in denial of the right of the government to take from
"either individuals or corporations any property which
"they may have rightfully acquired. In the most arbi-
"trary times such an act was recognized as pure tyranny
"and it has been forbidden in England ever since the
"Magna Charta, and in this country always. It is imma-
"terial in what way the property was lawfully acquired;
"whether by labor in the ordinary avocations of life, by
"gift or descent, or by making profitable use of a fran-
"chise granted by the State; it is enough that it has be-
"come private property, and is then protected by the
"law of the land."

"No constitutional principles are infringed by exer-
"cising a reserved power to revoke special privileges or
"immunities, unless the provision of our own Consti-
"tution is violated, which forbids doing it in such man-
"ner as to work injustice to the corporators or creditors
"of the corporation. Whether the mode adopted by the
"legislature in a given instance is just in this respect or
"not, whilst primarily a legislative question may, if pal-
"pably decided wrong, become a judicial one."

After the decision of this court in the Dartmouth College case, to prevent a charter granted by the legisla-

ture from becoming irrepealable, most of the States of the Union passed general laws or made provision in their Constitutions, that all laws thereafter enacted creating corporations, should be subject to amendment, revocation or repeal. Looker vs. Maynard, 179 U. S., 46.

In the Constitution of Alabama of 1875, this subject seems to have been considered of paramount importance, as it is dealt with in Article I, Section 23, and in Article XIV, Sections 1, 2 and 10. It seems to us that the phrase used in Article XIV, Section 10, "in such manner, however, that no injustice shall be done to the corporators," was put into the Constitution after the other sections to which we have referred, to prevent any oppression or wrong being done to corporators in reference to the *property* acquired by corporations while exercising their franchises, and to prevent interference with lawful contracts made by corporations while exercising their charter privileges. Among the framers of the Constitution of Alabama of 1875, were many eminent lawyers, and they must have known of and had in mind such decisions as that rendered by the Supreme Court of Massachusetts in Commissioners, etc., vs. Holyoke Water Power Company, 104 Mass., 451; same case, 6 American Reports, 247, decided at the March term, 1870, wherein speaking of the reserved power to amend or repeal the charters of corporations, Mr. Justice Gray, in delivering the opinion of the court, said: "It is sufficient now to say that it is "established by adjudications which we cannot disre-"gard, and the principles of which we fully approve, "that it at least reserves to the legislature the authority "to make any alteration or amendment in a charter "granted subject to it that will not defeat or substanti-"ally impair the object of the grant, or any rights which "vested under it, and that the legislature may deem "necessary to secure that object, OR OTHER PUBLIC OR "PRIVATE RIGHTS." and of the decision of this court in Miller vs. the State, 15 Wall., 498, decided January 6th, 1873, wherein Mr. Justice Clifford for this court, said: "It may be safely affirmed that the reserved power may exercised, and to almost any extent, to carry into offect the original purposes of the grant, *or* to secure the due

administration of the affairs, so as to protect the rights of stockholders and of creditors, and for the proper disposition of its assets," and of the decision of this court affirming the decision of the Supreme Court of Massachusetts in the case above cited, Holyoke Water Power Co. vs. Lyman, 15 Wallace, 519, decided February 10th, 1873, wherein Mr. Justice Clifford, for this court, said: "*To protect the rights of the public* and of the corporators, or to promote the due administration of the affairs of the corporation." We believe the framers of the Constitution of Alabama of 1875, when they put into that instrument Section 10 of Article XIV, after having already inserted Article I, Section 23, and Sections 1 and 2 of Article XIV, had in mind the idea that is thus expressed by Mr. Justice Field in the Railroad Tax Cases, 13 Federal Reporter, 754: "It (the State) may confer, by its gen- "eral laws, upon corporations, certain capacities of doing "business, and of having perpetual succession in their "members. It may make its grants in these respects "revocable at pleasure; it may make the grant subject "to modifications, and impose conditions upon its use, "and reserve the right to change these at will. But "whatever property the corporation acquire in the exer- "cise of the capacities conferred, they hold under the "same guaranties which protect the property of individ- "uals from spoliation. It cannot be taken for public use "without compensation. It cannot be taken without due "process of law, nor can it be subjected to burdens dif- "ferent from those laid upon the property of individuals "under like circumstances. The State grants to railroad "corporations formed under its laws, a franchise, and "over it retains control, and may withdraw or modify it. "By the reservation clause it retains power only over "that which it grants, it does not grant the rails on the "road; it does not grant the depots alongside of it; it "does not grant the cars on the track, nor the engines "which move them, and over them it can exercise no "power except such as may be exercised through its "control over the franchise, and such as may be exer- "cised with reference to all property used by carriers for "the public. The reservation of power over the fran-

"chise—that is, over that which is granted—makes its "grant a conditional or revocable contract, whose obli- "gation is not impaired by its revocation or change." We insist that it was never intended by the framers of the Constitution of Alabama by Section 10 of Article XIV, to nullify the provisions of Article I, Section 23, and Article XIV, [Sections 1 and 2, all of these provisions of the Constitution must be construed together. That it was intended by Section 10 of Article XIV to prevent just what this court decided could not be done, in the opinion delivered by Mr. Chief Justice Waite in the Sinking Fund Cases, 99 United States, 700, wherein it is said: "All agree that it (the reserved power), cannot be used "to take away property already acquired under the op- "eration of the charter, or to deprive the corporation of "the fruits actually reduced to possession of contracts "lawfully made," and as put by Mr. Justice White in Stearns vs. Minnesota, ex. rel. Marr., 179 U. S., page 259: "Before examining the scope of the act relied upon, it is "important to bear in mind the relations which are en- "gendered when a contract is entered into by a State "subject to the reserved power to repeal, alter or amend. "In such case no irrepealable contract, protected from "impairment under the Constitution of the Uniten States "takes effect, because it is impossible to conceive that "contract rights which are conferred subject to the "power of repeal, alteration or amendment are protected "from an impairment which under the terms of the "grant the State has reserved the right to make. Louis- "ville vs. Bank of Louisville, 174 U. S., 439-444; Citizens "Bank of Owensboro, 173 U. S., 636-644, et. seq.

"But whilst this is settled, it has also been equally "determined that the reserved right to repeal, alter or "amend does not confer mere arbitrary power, and can- "not be so exercised as to violate fundamental principles "of justice by depriving of the equal protection of the "laws or of the constitutional guaranty against the "taking of property without due process of law. St. "Louis, I. M. & S. R. R. Co. vs. Paul, 173 U. S., 404-408, "and cases cited. And an apt illustration of the appli-

"cation of this doctrine is found in Louisville Water Co. "vs. Clark, 143 U. S., 1."

II.

In the amended bill (Record, page 65), and in the briefs of counsel, it is charged that under the Constitution of Alabama, Article I, Section 37, and Article IV, Sections 50, 54 and 55, the city of Mobile cannot be authorized by the general assembly of Alabama to operate a system of water works to supply its inhabitants with water for domestic and sanitary purposes. The provisions of the Constitution of Alabama referred to read as follows:

Article I, Section 37: "That the sole object and only "legitimate end of government is to protect the citizen "in the enjoyment of life, liberty and property; and "when the government assumes other functions, it is "usurpation and oppression."

Article IV, Section 50: "The General Assembly "shall not have power to authorize any municipal cor- "poration to pass any laws inconsistent with the general "laws of this State."

Article IV, Section 54: "The State shall not engage "in works of internal improvement, nor lend money or "its credit in aid of such; nor shall the State be inter- "ested in any private or corporate enterprise, or lend "money or its credit to any individual, association, or "corporation."

Article IV, Section 55: "The General Assembly "shall have no power to authorize any county, city, town, "or other sub-division of this State, to lend its credit, or "grant public money or thing of value, in aid of, or to "any individual, association, or corporation whatsoever, "or to become a stockholder in any such corporation, "association, or company, by issuing bonds or otherwise."

When a city furnishes its inhabitants with an abundance of pure water, how can it be said that it is violating Article I, Section 37, of the Constitution, which provides that the sole "object and only legitimate end of govern- "ment is to protect the citizen in the enjoyment of life, "liberty and property?"

In the Standard Dictionary the word "protect" is defined: "To keep, as from harm, detioration, danger, "temptation, or any other evil, by interposition, active "or passive; preserve in safety; guard; shield; defend: "said of both persons and things with wide range of "meaning." In the case of the Intendant and Town Council of Livingston vs. Pippen, 31 Alabama, 542, decided in 1858, Justice George W. Stone for the Supreme Court of Alabama, said: "The Intendant and Town "Council of Livingston have the ordinary public powers "which are conferred on municipal corporations. The "express grants of power are copied in the opening of this "opinion. Nothing is more important as a sanitary and "police regulation, than an abundant supply of pure "water. Its uses are too well known to require notice "here. We hold, that the corporate authorities had the "power, as such, to procure water on the public square "of the town of Livingston."

It seems to us that the operation of water works by the the City of Mobile, is not passing "any laws inconsistent with the general laws of this State," hence is not in violation of Article IV, Section 50, of the Constitution of Alabama; and that it is too clear for argument that the word "laws" as used in this section of the Constitution, refers to rules of action prescribed to enforce justice and duty; rules of civil conduct to be prescribed by a municipality. We submit that the internal improvements meant in the Constitution, Article XIV, Section 54, were of the character of turnpikes, canals, railroads, etc. That sections 54 and 55 of Article IV did not prohibit the general assembly from authorizing the City of Mobile to build and operate water works, we quote the case of Sheppard vs. Dowling, 28 Southern Reporter, 795, decided by the Supreme court of Alabama, May 10th, 1900: "The "framers of the Constitution of Alabama were careful "to differentiate the State from municipal sub-divisions, "towns, cities, and counties in respect of what is forbid- "den to be done by the State, considered as a separate "entity, on the one hand, and what the general assem- "bly is inhibited to authorize such sub-divisions to do "on the other; and they embodied in the instrument two

"distinct provisions, having reference severally to the "State and its said municipalities, containing, respectively the one all the limitations intended to be ordained in "this connection upon the powers of the State as such, and "the other all the limitations intended to be put upon "the power of the legislature in respect to authorizing "action by counties and towns. This is the ordinance "as to the State, (Article IV, Section 54): The State "shall not engage in works of internal improvement, "nor lend money or its credit in aid of such; nor shall "the State be interested in any private or corporate "enterprise, or lend money or its credit to any individual, "association, or corporation." And this as to the towns "and counties (Section 55): "The general assembly "shall have no power to authorize any county, town, or "other sub-division of this State to lend its credit, or to "grant public money or thing of value, in aid of, or to "any individual, association, or corporation whatsoever, "or to become a stockholder in any such corporation, "association or company, by issuing bonds, or otherwise." There is a notable absence from this last ordinance of any inhibition upon the legislature to authorize towns and counties to engage or be interested in "private enterprises, and the intent of the members of "the constitutional convention to leave the general "assembly a free hand in this connection is emphasized "and made to stand out in bolder relief by the inclusion "of such a provision in the immediately preceding section, having reference solely to the State as an entity "distinct from such sub-divisions. And this intent is "further borne out and sustained by reference to the "history of the times just preceding the framing of this "constitution, and to the conditions then existing, from "which it is clearly deducible that enterprises of the "nature provided for in the act under consideration were "not among the evils which the convention had in mind "and purposed to provide against it by this ordinance, "limiting legislative power in respect of authorizations "to towns and counties. Garland vs. Board, 87 Alabama, "223. Hence our conclusion that it was entirely competent for the general assembly to authorize towns and

"counties to carry on the liquor traffic as an incident to "the regulation of that traffic provided for by this act."

If cities, towns or counties may be authorized by the general assembly to sell liquors to their inhabitants. surely it will not be held that such sub-divisions of the State cannot be authorized by the general assembly to sell water to their inhabitants.

This court has again and again announced that it would follow the construction put upon the constitution of a State by its highest court.

Brown vs. New Jersey, 175 U. S., page 174.
Erb as Receiver, vs. Morasch, 177 U. S., 584.

We insist that in passing the several acts authorizing the City of Mobile to build a system of water works, and the act amending the charter of the appellant, the general assembly of Alabama had unlimited power, except so far as restrained by the constitutions of the United States and of Alabama, and if these acts do not violate any provision of the Federal or State constitution they cannot be annulled by the courts, whether their provisions are wise or unwise, or whether their operation be hurtful or beneficial.

Henley vs. State, 98 Tenn., at page 679.
Cooley's Constitutional Limitations (6th Ed.,) 200-201.

We reiterate what we claimed in our briefs in support of the motion to dismiss or affirm, filed at the October Term, 1900, that there is no contract existing between the State of Alabama and the appellant, the Bienville Water Supply Company. The Supreme Court of Alabama passed upon this question in the case of the City of Mobile vs. Bienville Water Supply Company, 30 Southern Reporter, 446, decided June 11th, 1901. The court said:

"It cannot be pretended that in granting a charter "to the complainant company in 1883, the legislature "conferred on that company any exclusive privilege for "supplying the City of Mobile and its inhabitants with "water. All rights not exclusively granted to the com- "plainant were reserved, and the rights thus reserved

"included the granting of a franchise to another cor-
"poration to carry on the same business in the same
"territory. While the effect of granting such a fran-
"chise afterwards, to the city, might be to impair, and
"possibly by fair competition, to ultimately largely de-
"stroy the value of the complainant's plant, it would
"not be in excess of legislative power to grant the fran.
"chise to the city, nor would it in anywise infringe the
"federal constitution, prohibiting a State legislature
"from passing laws impairing its obligation. If there is
"no contract, there is nothing in the grant on which the
"constitution could act. The element of a contract by
"the State with the complainant company, did not enter
"into the grant of its franchise to establish and operate
"a system of water works in Mobile. Stone vs. Missis-
"sippi, 101 U. S., 814; Skaneateles Water Works Co. vs.
"Village of Skaneateles. 161 N. Y., 154; Charles River
"Bridge vs. Warren Bridge, 11 Peters, 420; State vs.
"City of Hamilton, 47 Ohio St., 52; Scranton Electric
"Light & Heat Co's. Appeal, 122 Pa. St., 154; 2 Beach,
"Priv. Corp., Sections 22, 27."

The record discloses no breach of the obligation of a contract entered into by and between the State of Alabama and the appellant, and the decree of the Circuit Court should be affirmed.

Respectfully submitted,

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